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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a *Writ of Certiorari* to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a large unselective membership organization can invoke the First Amendment to defeat application of an anti-discrimination law and expel a long-standing exemplary member, when none of the purposes, messages, or values that bring its members together are substantially altered or burdened by application of that law.

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STATEMENT OF THE CASE

Boy Scouts of America

Boy Scouts of America ("Boy Scouts" or "BSA") was chartered by Congress in 1916 under Title 36 of the United States Code, "Patriotic Societies and Observances," to "promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. . . ." 36 U.S.C. § 23 (West 1983). The Charter requires BSA to make a yearly report to Congress of its "proceedings." A.1162.[1] BSA's close and unique relationship with the federal government also extends to the President, the military, the astronaut corps, and other departments and agencies. 27a-28a.

State and local governments, too, are key participants in, and formal sponsors of, Scouting, and give BSA substantial contributions and special privileges.[2] A.1049-A.1152; A.1592; 27a-28a. "In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey." 4a. The same is true nationally. 29a. As the New Jersey Supreme Court noted, "New Jersey governmental entities are of course bound by the LAD. Their sponsorship of, or conferring of special benefits on, an orga-

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[1] Consistent with the Petition's references to the record, numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court, and numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition.

[2] BSA "charters" public and private religious and secular entities to "sponsor" Scouting troops and activities. It reviews and renews all sponsors' charters annually. 3a-5a.

nization that practices discrimination would be prohibited." 29a.[3]

BSA's bylaws provide that "[b]oth membership in Scouting and advancement and achievement of leadership in Scouting units are open to all boys without regard to race or ethnic background, and advancement and achievement of leadership in Scouting is based entirely upon individual [achieve]ment." A.1174. BSA tells the public:

> Our federal charter sets forth our obligation to serve boys. *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy*. The National Council and Executive Board have always taken the position that Scouting should be made available for *all boys* who meet entrance age requirements.

A.1027 (emphasis supplied). The courts below found that BSA mounts aggressive, ongoing, and sweeping national and local recruitment campaigns, 3a; 24a-30a; 131a, and observed:

> Boy Scouts has been firmly committed to a diverse and "representative" membership. It recognizes that the skills it teaches its members are needed "in all economic, cultural, and ethnic groups." . . . Its objective is to see to it "that all eligible youth have the opportunity to affiliate with the Boy Scouts of America." . . . Boy Scouts

[3] BSA attempts to downplay the significance of its entanglement with public institutions, arguing (without record support) that school and public sponsorship is "dwindling," and that "[t]his case does not involve the question whether public bodies can or should sponsor Boy Scout Troops." Pet. 8-9, n.4. However, the continued extensive involvement of public schools and other government entities in Scout sponsorship (which BSA continues to seek) *is* relevant, not least because it belies BSA's central premise that BSA members come together to express a message requiring discrimination. Obviously public entities, particularly in a state like New Jersey with its LAD, do not and cannot come together to support or implement any such purpose. 29a. Permitting BSA to discriminate in violation of the LAD could have a significant impact on the continued participation of schools and other public sponsors in Scouting.

> does not seek to limit membership to individuals of a particular religious faith or moral persuasion. . . . The result of this "all-inclusive" membership policy is the admission of four million boys and over one million adults.

59a (citations omitted). Since its inception in 1910, BSA has had over 90 million members. A.1323.

All Boy Scouts adult members are automatically "leaders," and BSA admits that the terms "member" and "leader" are "interchangeable" for the million-plus adults at all levels. 10a-11a.[4] James Kay, "the highest ranking employee in Monmouth Council and the official who first made the decision to terminate [James] Dale," stated in his deposition that:

> he was not aware of any previous rejection by BSA's National Council of an adult application for membership in Monmouth Council. Kay was likewise unaware of any membership rejection in the previous council with which he was affiliated for eight and one-half years.

78a-79a.

Alongside the publicly sponsored Scout units are many units sponsored by religious bodies, and Scouting's rules and message are explicitly pluralistic. "BSA categorically states: 'religious instruction is the responsibility of the home and church.' " 9a. BSA bylaws declare Scouting to be "absolutely non-sectarian," A.1176, and BSA informs adults of this core policy on every adult membership application (in stark contrast to the absence of any communication to members, applicants, or parents regarding sexual orientation).

[4] Petitioner Monmouth Council, which is one of fourteen local Boy Scouts councils chartered to carry on Scouting activities in New Jersey, had 3000 adult volunteer "leaders" and four paid Scouting professionals in 1991. Of the 3000 volunteers, some 340 were assistant Scoutmasters. 5a.

Boy Scouts' stated position on issues of sexuality is that " 'boys should learn about sex and family life from their parents, consistent with their spiritual beliefs.' " 9a. BSA's diverse public and private, religious and secular members and sponsors come together for a program of activities and moral values such as inclusion, community service, and honesty—not to promote anti-gay ideology or any other views about sexuality.[5]

James Dale

At the time of his expulsion from Scouting at the age of twenty, James Dale had spent more than half of his life as a member of the Boy Scouts, and had won virtually every award available to a Scout. For Dale, as for so many American men and boys, Scouting was a central part of growing up and becoming a citizen. In addition to teaching him about camping and the outdoors, Scouting provided Dale with a sense of civic responsibility, fostered his self-confidence, and gave him the opportunity to have fun and form friendships with other boys in his community. A.1907-A.1909. As he participated in camping trips, fundraising events, summer Scout camp, and national activities, as well as regular troop meetings, Dale successfully advanced through various Scout leadership positions, including Bugler, Assistant Patrol Leader, Patrol Leader, and ultimately Junior Assistant Scoutmaster. A.3287-A.3294.

BSA recognized Dale's outstanding commitment and accomplishments. A.61-A.62. It selected him as a featured youth speaker, A.1912, and admitted him to the Order of the Arrow established by BSA to "recognize those Scout campers who best exemplify the Scout Oath and Law in their daily lives." A.1006. BSA elevated Dale to the status of Vigil

[5] Boy Scouts' own representatives admitted under oath that it is not an explicit aim of the organization to teach about or discourage homosexuality. A.4395; A. 4405 (depositions of BSA officials Charles Ball and James Kay).

Honor, the highest mark of distinction within the Order. A.928. And it awarded him the Eagle Scout Badge, the highest rank in Scouting, attained by only two percent of all Scouts. A.1909. Finally, when Dale became an adult member at the age of eighteen, BSA invited him to become Assistant Scoutmaster of Troop 73. A.1913. Throughout, as the New Jersey Supreme Court found, James Dale consistently exemplified, "accept[ed,] and endors[ed] Boy Scouts' moral principles." 57a-58a.

The Revocation Of James Dale's Membership

While an undergraduate student at Rutgers University, James Dale first acknowledged to himself that he is gay. A.1921-A.1922. On July 8, 1990, a local newspaper, the *Newark Star-Ledger*, ran an article entitled "Seminar addresses needs of homosexual teens," which discussed the psychological and health needs of lesbian and gay teenagers, including the harms caused by discrimination and isolation. The article and accompanying picture mentioned Dale as a participant, as a Rutgers student, and as co-president of the campus lesbian and gay student group, but did not in any way refer to his membership in Scouting. A.1947. The 19-year-old was quoted not "as a gay activist," Boy Scouts' Petition for Writ of Certiorari ("Pet."), at 6, but as a student looking for community and support. A.1946. This news story, however, provided BSA with a piece of information that it would act upon—Dale's sexual orientation.

Days after the article, Monmouth Council sent Dale a letter summarily revoking his membership and instructing him to "sever any relations [he] may have with the Boy Scouts of America." A.1947. Stunned, Dale wrote back asking the reason. A.1949. By letter dated August 10, 1990, BSA responded that it "specifically forbid[s] membership to homosexuals." A.1950.[6]

[6] BSA denied Dale's request for a hearing before the National Council Review Committee because "[Boy Scouts] does not admit

On July 29, 1992, James Dale brought suit against BSA for its violation of the New Jersey Law Against Discrimination ("LAD").

The Superior Court of New Jersey, Chancery Division

On the parties' cross-motions, the Superior Court of New Jersey, Chancery Division, granted summary judgment for BSA and dismissed Dale's complaint. The court held that Scouting did not constitute a "place of public accommodation" under the LAD. 204a. In *dicta*, the court found that the right of expressive association shielded BSA's expulsion of Dale from the LAD. 224a. Neither an intimate association nor free speech defense was raised before, or addressed by, the court.

The Superior Court of New Jersey, Appellate Division

On March 2, 1998, the Superior Court of New Jersey, Appellate Division, reversed. Noting BSA's size and non-selectivity, the court found BSA to be a public accommodation under New Jersey law. 119a. Accepting *arguendo* BSA's claim that its goals and activities are expressive, the court found that because no message or purpose bringing the members together was in fact burdened, application of the LAD would not "impair the BSA's ability to express its fundamental tenets and to carry out its social, educational and civic activities." 136a. The court rejected BSA's intimate association defense, raised there for the first time. A free speech defense was not argued before, or addressed by, the court.

The Supreme Court of New Jersey

The Supreme Court of New Jersey unanimously affirmed.

First, the court found that as a matter of New Jersey law, BSA is a place of public accommodation for two reasons: (1)

avowed homosexuals to membership in the organization so no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting." A.1952.

BSA holds itself out as open to "all boys," 35a, "engages in broad public solicitation through various media," 25a, and "reaches out to the public in a myriad of ways designed to increase and sustain a broad membership base," 26a; and (2) BSA is singularly entangled in, and privileged by, special relationships it seeks with "federal and state governmental bodies and with other recognized public accommodations," 27a, including "Boy Scouts' connection to public schools and school-affiliated groups [which] constitutes its single most beneficial governmental relationship." 29a.

Second, the court found that BSA does not fall within the LAD's exceptions for organizations that are "distinctly private," provide a religious educational facility, or act *in loco parentis*. Noting BSA's non-selective invitation to "all boys," 35a, the court stated:

> We acknowledge that Boy Scouts' membership application requires members to comply with the Scout Oath and Law. We do not find, however, that the Oath and Law operate as genuine selectivity criteria. To the contrary, the record discloses few instances in which the Oath and Law have been used to exclude a prospective member; in practice, they present no real impediment to joining Boy Scouts . . . .
>
> Most important, *it is clear that Boy Scouts does not limit its membership to individuals who belong to a particular religion or subscribe to a specific set of moral beliefs*. . . .

37a-38a (emphasis supplied).

Third, the court rejected BSA's asserted First Amendment defense based on the rights of expressive and intimate association. The court scrupulously applied the framework set forth by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State*

Club Association v. City of New York, 487 U.S. 1 (1988). It concluded that application of the LAD does not violate the freedom of expressive association "because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views." 52a. The court explained that:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.

52a. The court found further that "[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society." 62a. Therefore, even if the application of the LAD to petitioners had resulted in some slight infringement upon Boy Scouts' right of expressive association, that infringement would be justified as serving New Jersey's compelling interest in eradicating discrimination under the LAD. 63a-64a.

Finally, the court found that *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), did not compel a different result. *Hurley*, a speech case about a parade, does not alter this Court's careful and well-settled framework for analyzing expressive association defenses asserted by membership organizations. Under that framework, with thorough fact-finding, the New Jersey Supreme Court unanimously held that BSA failed to show any violation of the First Amendment.

REASONS FOR DENYING THE WRIT

Summary of Argument

This case does not warrant review by this Court. As Petitioners concede, Pet. 26-27, there is no conflict among the state courts or the federal circuits. This Court's jurisprudence for evaluating expressive or intimate association claims is clear and well-established, and has been applied consistently and without confusion by the lower courts. The court below properly followed that framework here.

As the New Jersey Supreme Court unanimously concluded, BSA's argument rests on a false premise; the record contains no evidence to support BSA's contention that preventing it from discriminating against its gay members would in any way alter or burden the messages, purposes, and values that bring Scouting's diverse members together. Based on an exhaustive examination of the extensive record in this case, the court found that the application of the LAD does not change the ability of the members of Scouting to continue to express the actual shared purposes and values that bring them together in BSA. Thus, enforcement of the state civil rights law creates no true First Amendment problem and presents no new federal question.

I.

BSA's Petition Rests On A False Premise: Scouting's Members Do Not Share Any View Or Expressive Purpose Concerning Sexual Orientation Or Related Matters

BSA's effort to conjure up a First Amendment issue warranting this Court's re-examination hinges on its attempt to relitigate the state appellate courts' *factual* finding that BSA failed to demonstrate an anti-gay or related expressive purpose of its members that would be burdened by application of

the LAD.[7] BSA's entire petition rests on the pivotal false premise that its members associate for such an anti-gay or related purpose.

The record fully supports the New Jersey Supreme Court's unanimous finding that the LAD does not burden any actual expressive purpose of Scouting's members. Those members do not come together in Scouting around a shared "moral code" or viewpoint regarding gay people, heterosexuality, homosexuality, or sexuality. Stripped of its mischaracterizations and repeated indifference to the facts, the Petition presents no novel federal question regarding a membership organization's associational rights.

A. The Documentary Record And Scouting's Activities Show No Such View Or Purpose

The court below followed this Court's well-settled jurisprudence that the right of expressive association does not protect an organization's ability to discriminate in furtherance of every view that any of its members or leaders happen to espouse, but "only those views *that brought them together*." *Roberts*, 468 U.S. at 623 (emphasis supplied). *See also Rotary*, 481 U.S. at 548-49; *New York State Club Ass'n*, 487 U.S. at 13; *Hurley*, 515 U.S. at 580-81 (reaffirming that for purposes of an expressive association analysis courts must examine whether an excluded person's "*manifest views* [are] at odds with a position *taken* by the [organization's] *existing members*") (emphasis supplied). The findings of the New Jersey Supreme Court and the voluminous record below refute

[7] This Court's rules provide that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." Sup. Ct. R. 10. Although it would have this Court disregard the factual findings below, the Petition points to no evidence in the record that renders the factual findings of the court below "erroneous." Further, the court below properly stated and properly applied the well-settled governing rule.

BSA's central misleading suggestion that an anti-gay "moral code" or any related viewpoint or message is part of what brings the members together in Scouting.

The court below, and the intermediate appellate court as well, found that BSA failed to make the predicate showing of a true message or purpose burdened by the civil rights law. The courts drew this conclusion based on the record regarding: (1) Scouting's stated purposes, activities, and own materials; and (2) the diversity of Scout members and sponsors and their views. BSA's invitation to relitigate the entire factual record is inappropriate for certiorari, and unnecessary in light of the thorough opinions below based on the enormous record of evidence. Thus, what follows here are only brief summaries of how the evidence supports the courts' key finding under this Court's established doctrinal framework.

1. Those Materials, Activities, And Stated Purposes That Are Known To Scouting's Members Either Are Silent About Sexual Orientation And Related Themes, Or Actually Refute The Petition's Claim Of A Shared Anti-Gay View Or Purpose

BSA has created a plethora of recruiting and informational materials that were put into evidence below, yet was unable to produce even a single document disseminated or generally made available to members or prospective members containing the anti-gay "moral code" it seeks to litigate anew as its members' ostensible expressive purpose.

For example, the Scout Oath, Law, Motto, and Slogan do not mention gay people or sexuality. A.2542-A.2549. Nowhere in the Scout Handbook's extensive explanations of Scouting principles is there reference to gay people or their alleged "immorality." A.2247-A.2600. Indeed, in the years of litigation below, BSA has centered its defense on the argument that this supposedly central moral tenet should be inferred from the requirements that Scouts be "clean" and

"morally straight."[8] However, as the court below found, these terms are not defined anywhere in Scouting materials in a way that is burdened or altered by gay people's continued participation:

> The words "morally straight" and "clean" do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral. We doubt that young boys would ascribe any meaning to these terms other than a commitment to be good.
>
> Boy Scouts also argues that the immorality of homosexuality can be implied from the moral principles expressed by the Scout Oath and Law. Yet, Boy Scouts teaches that "moral fitness" is an individual choice and defers the ultimate definition to its members . . . .

55a. Neither can the anti-gay "moral code" asserted by the Petition be gleaned from the *implicit* teachings of Scouting, which emphatically and repeatedly emphasize values of tolerance, inclusion, and respect for self, for the law, and for others.[9]

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[8] Ironically, it is BSA's discrimination against James Dale that in fact violates the Scout Oath and Law. BSA's own definition of "morally straight" in the Scout Handbook instructs members: "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open." A.2543.

[9] Just as Boy Scouts' stated core purposes and "manifest views," *Hurley*, 515 U.S. at 580-81, have nothing to do with discrimination or sexuality, neither do its actual activities of camping, sports, outdoors skills, community service, and the like. While Scouting reinforces important pluralistic and general values, as the Scout Handbook states, "most boys join Boy Scouting for one reason—to have fun in the outdoors." A.991; *see also* 53a. BSA describes the meanings behind the words in the Scout Oath and Law in the Scout Handbook, A.2542-A.2549, telling boys, for example, that "[a] Scout is a friend to all. He seeks to understand others. He respects those with ideas and customs that are different from his own." A.2545. BSA's explanations also stress the importance of obeying the laws of the nation, and require Scouts to "respect and defend the rights of all people." A.2543. BSA's Congressional Charter provides

Boy Scouts' own materials affirmatively state that conveyance of any message regarding gay people, heterosexuality, homosexuality, or sexuality in general is neither a primary nor even an incidental goal of Scouting. *See* A.4409. Rule number one of the Scoutmaster Handbook's section on "Sex Curiosity" states: "You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this." A.3589.[10] Even the BSA post-litigation "position statement" on homosexuality (one of a handful drafted by public relations consultants but never shown to members) states:

> [t]he reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.

A.4409.

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that BSA's bylaws and rules shall not be "inconsistent with the law of the United States of America or any state thereof." 36 U.S.C. § 22 (West 1983).

[10] The Petition asserts that "[t]he Scoutmaster's role includes communication of the organization's teachings on sexual morality," Pet. 4, and selectively quotes from the Scout Handbook. The full passage referenced by BSA reads: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster." A.2532. As the court below found, 9a, the record is replete with additional materials telling Scoutmasters that discussion about sex and sexuality (gay or non-gay) is not for the program and is best left to others in the boy's life, A.4343. Scouting executives advise that sexual orientation and sexuality in general are *not* Scouting issues. A.4346.

2. The "Position Statements" Prepared By BSA To Defend Its Discrimination, Like The "Policy" Itself, Are Inconsistent And Are Not Shown To Or Known By BSA Members

The Petition's key premise—that BSA has a "moral code" impaired by gay members—is further refuted by the fact that even the "policy" itself (supposedly embodying core shared values) is in fact muddled, inconsistent, and kept secret from its members and volunteers. As of the time BSA revoked Dale's membership, no incarnation of a "policy" of excluding gay participants had ever been circulated among youth or adult members, applicants, or "leaders," A.3289; A.3297, or even made available upon request. A.4334. Prior to publicity surrounding this and other litigation, the discriminatory "policy" was not known to Scouting's members—or even to the Professional Scouters, Board Members, and Youth Leaders responsible for communicating the purposes and aims of Scouting to others within the organization. 141a-142a; *see also* A.1625-A.1905 (affidavits of over a hundred BSA members testifying that they were unaware of any anti-gay policy—let alone purpose—of Boy Scouts).

While BSA officials, with the help of an outside media consulting firm, have developed a smattering of internal "position statements" regarding gay people, as the New Jersey Supreme Court noted in reviewing the record, "[t]he self-serving nature of these [position statements] is apparent." 54a.[11] These litigation documents do not establish that the members of Scouting have come together for the purpose of expressing the

[11] In testimony, BSA conceded that these "position statements" are "drawn up not to communicate within our organization but to help others outside of the [S]couting family to understand better the values and standards of the organization." A.4433. In these statements, which are simply litigation stances and do not reflect a shared view of the members (and are not themselves distributed to the members or even Scouting's volunteer "leaders"), 140a-142a, BSA's various iterations of the discriminatory "policy" are internally inconsistent. A.3247; A.3245.

view—either to the world at large or to one another—that gay people are "immoral" (or any such position), as the Petition would have this Court believe.[12]

B. The Diversity Of Boy Scouts' Sponsors And Members Also Supports The Finding Below

As the court below found, the diversity of Boy Scouts' sponsors and members further demonstrates that they do not come together around a "specific expressive purpose," *New York State Club Ass'n*, 487 U.S. at 13, that excludes continued gay participation. 56a. Boy Scouts' sponsors include public schools, police and fire departments, the military, secular chartered sponsors, and "[a] large and diverse group of religions that subscribe to many different and sometimes contradictory beliefs." 9a. The religious entities, including Methodists, Mormons, Jews, Catholics, Muslims, Episcopalians, and others, hold widely divergent views on sexual morality, as opposed to the one view propounded in the Petition. Under Scouting's pluralism, the religious participants are free to disagree on matters not related to Scouting such as

[12] Furthermore, there is a difference between a practice or "policy" pursued by an organization or employer, and an actual "specific expressive purpose," *New York State Club Ass'n*, 487 U.S. at 13, which triggers First Amendment protection. Otherwise the mere fact that a policy of discrimination was in place among groups like Jaycees or Rotary would end the entire inquiry. Certainly, a written but undistributed policy is not enough to transform discriminatory actions into a true expressive purpose of the organization's members:

> [F]ew would claim that the YMCA would be entitled to exclude blacks if the YMCA had a written policy that one of its purposes was to instill good morals in its members and that belief in white superiority was necessary to fulfill that purpose, even though expression of white concerns was not a major part of the YMCA's activities.

Welsh v. Boy Scouts of Am., 742 F. Supp. 1413, 1432 n.28 (N.D. Ill. 1990), *subsequent decision on other grounds*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993).

sexual, religious, or political views. Meanwhile, the public entities—particularly in a state like New Jersey, with its legislated commitment to end discrimination—clearly do not and could not sponsor units or engage in Scouting in order to express the discriminatory views of the Petition. 29a.

Scouting's broad outreach and recruitment seeking "all boys," A.1174, underscore that the courts below were correct: the members of Scouting do not all share the same sexual morality or conception of the terms "morally straight" or "moral fitness," nor do they come together for expression regarding that which divides them. 56a. The existence of these diverse views among the members and sponsors (including public entities) is not simply incidental or a mere "internal disagreement." Pet. 25. It is dispositive proof that the members of this organization do not associate for any shared message requiring exclusion of gay members.

Finally, the Petition's claim that the exclusionary policy is necessary to promote moral or other "views" is most powerfully and directly contradicted by the fact that BSA accepts and retains *non-gay* youth and adult members and sponsors regardless of their views on BSA's anti-gay policy. It permits them to express their contradictory moral or other views on sexuality or sexual orientation, and even to express their opposition to the anti-gay policy once they learn of it.[13] 56a. By contrast, Dale was expelled not for expressing any viewpoint, but because he was discovered to be gay. 59a; 67a.

[13] Individuals and entities within Scouting who have expressed contrary views without expulsion or sanction include current and former members of the Executive Board of BSA, A.4378-A.4379; A.4020-A.4022; A.4461-A.4490; BSA Local Councils, A.3982-A.3984; A.4009-A.4014; Scout Troops, A.3973-A.3974; A.3977; Chartered Organizations, A.3885; A.3893-A.3895; A.3911; A.3958-A.3959; A.3805-A.3806; A.3781; A.3972; professional and volunteer Scouters; A.1970; A.4022; A.1979; A.4335; A.4341; A.4379; A.1625-A.1905; A.4027-A.4328; and Scouts and their parents, A.1970; A.1979; A.3973; A.3975; A.4020; A.4335; A.4342; A.4379-A.4380; A.1625-A.1905; A.4027-A.4328.

There is no new legal issue here, no incursion on expression, no "First Amendment principles . . . manifestly endangered by the decision below." Pet. 13. There is only an effort to defend discrimination that has been properly reviewed by the courts below under the standards laid out by this Court.

II.

The Decision In This Case Does Not Conflict With Other Lower Court Decisions

This is not a case where a "state court of last resort [has] decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10. BSA concedes that there is no explicit conflict among the decisions of lower courts, and "in all likelihood one will never arise." Pet. 27. Nor is there the phantom "conflict in principle" that BSA concocts. *Id.* None of the decisions relied upon in the Petition even reach the First Amendment issue that BSA asserts this Court should again review, let alone reach it in a way that conflicts with the decision in this case.[14]

The cases cited in the Petition involved differing BSA membership and employment policies, including BSA's discrimination based on sex, sexual orientation, and religion. These cases all turned on statutory interpretation questions involving different state or federal laws, not the LAD (on

[14] *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) (applying Title II of the federal Civil Rights Act); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998) (state law); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998) (state law); *Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (state law); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995) (state law); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976) (state law).

which the New Jersey Supreme Court has the last word). There is no common federal question at all among the cluster of cases from which BSA tries to extract the requisite important conflict.

BSA argues that this Court should intervene where there is concededly no conflict because, it speculates, lower court judges in the several states will all disingenuously disregard the language of their respective state statutes in order to avoid any First Amendment ruling. Pet. 26-28. Because of the judicial evasion they prophesy, BSA seeks a special opportunity to relitigate before this Court the facts of this case.

Courts of course seek to interpret statutes so as to avoid constitutional conflict, but not to the point of rewriting them; this Court should not presume that judges will take inappropriate and evasive action as BSA predicts. *See Allen v. McCurry*, 449 U.S. 90, 105 (1980) (rejecting "general distrust of the state courts to render correct decisions on constitutional issues"); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (rejecting "basic mistrust of state courts as fair and competent forums for the adjudication of federal constitutional rights" as legitimate ground for granting federal habeas corpus relief). Rather, the more appropriate course is to allow the lower courts to do their job handling the application of statutes and legal principles to cases such as this, until a real and important question or conflict in federal law develops.[15]

[15] Petitioners themselves point out that other challenges to BSA's various discriminatory policies are pending in the lower courts. Pet. 28. Likewise, other youth or adult membership organizations seeking to discriminate have faced enforcement of civil rights laws in the past, and may face such enforcement in the future. It is entirely possible that under different facts, a court may yet find a public accommodations law applicable, but unconstitutional. When and if that happens at the state supreme court or federal court of appeals level, a conflict might arise that would warrant this Court's intervention, but until then, certiorari is not appropriate.

III.

There Is No Doctrinal Confusion In This Court's Expressive Association Jurisprudence, And The Lower Courts Have Had No Problem Applying This Court's Precedents

Just as there is no conflict among the lower courts, there is no conflict here between the decision below and the "relevant decisions of this Court." Sup. Ct. Rule 10. This Court's past rulings fit together coherently and effectively to protect genuine First Amendment interests while at the same time allowing government to pursue compelling anti-discrimination objectives. Because there is no confusion either in the doctrine or among lower courts, and because there is no truth to the Petition's assertion that *Hurley* created a conflict or that First Amendment principles are more generally threatened, review by this Court is unnecessary.

A. The Expressive Association Precedents Of This Court Are Clear And Settled

In the *Roberts* trilogy, this Court established the definitive framework for analyzing an alleged conflict between a nondiscrimination statute and the freedom of expressive association asserted by an organization in its membership policies. *See Roberts*, 468 U.S. at 622-29; *Rotary*, 481 U.S. at 548-49; *New York State Club Ass'n*, 487 U.S. at 13. Under that framework, an organization asserting an expressive association defense must first as a necessary predicate show "*specific* expressive purposes" or actual "views that the club's members wish to promote," which bring the members together in expressive association. *New York State Club Ass'n*, 487 U.S. at 13 (emphasis supplied). Second, the organization must show that application of the statute would impose "serious burdens," *Roberts*, 468 U.S. at 626, on shared "basic goals," *Rotary*, 481 U.S. at 548, such that the continued participation

or admission of a member under an antidiscrimination law would require the other members to "abandon or alter" their expressive activities. *Rotary*, 481 U.S. at 548; *see also New York State Club Ass'n*, 487 U.S. at 13. Finally, even if these predicates for invoking the defense are met, some infringement of expression could be justified in light of the compelling interest in enforcing antidiscrimination laws. *Roberts*, 468 U.S. at 623; *see also Rotary*, 481 U.S. at 549. The *Roberts* framework is clear, and preserves important constitutional and social values.

B. *Hurley* Is A Speech Case Rather Than An Expressive Association Case, And Fits Comfortably And Clearly Alongside The *Roberts* Trilogy

Seeking to create a conflict where there is none, BSA asks this Court to interpret *Hurley* so as to eviscerate the *Roberts* test. However, *Hurley*, which evaluated the application of a public accommodations statute to a contingent seeking to march in a parade, does not disturb the Court's jurisprudence governing expressive association claims about large community organizations' membership policies.

In *Hurley*, this Court based its finding that the statute violated the freedom of speech on a parade's distinctive status as a "form of expression" in and of itself—a finding supported by a thorough history of parades and an analysis of parades as symbolic speech akin to saluting a flag, wearing an armband, hoisting a flag, or displaying a swastika. *See Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568-69 (1995) (citations omitted). *Hurley* concerned application of a civil rights law to a pure speech act (a parade), and to an attempt to change the message of that speech (a contingent with a banner seeking entry into the parade). Thus, the bulk of the *Hurley* opinion necessarily applied a pure speech approach; the facts of the case took it out of the *Roberts* trilogy analysis.

Hurley did not purport to displace this Court's expressive association jurisprudence on exclusionary membership decisions. In fact, *Hurley* briefly considers whether the outcome of the case would differ under expressive association analysis, rather than pure speech analysis. 515 U.S. at 580-81. There, Justice Souter, writing for the unanimous Court, explicitly preserved both the structure and the strength of the *Roberts* framework, holding that banner-carrying marchers in a parade could "be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose *manifest views* were at odds with a *position taken by the club's existing members*." *Id.* (emphasis supplied). With this emphasis again on the actual views—rather than mere identity—of individuals, and the focus again on actual core views of the *members*, *Hurley* reaffirms the *Roberts* approach.

First, *Hurley* reaffirms the significance of a showing that the excluding organization be objecting to the actual expression or *views* allegedly infringing its expressive association rights, rather than discriminating against individuals because of their identity or shorthand characteristics. *See id.* at 572 (The parade organizers "*disclaim any intent to exclude homosexuals as such*, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.") (emphasis supplied).

Second, *Hurley* notes that the basis for exclusion must be that such individual's views are "manifest," not presumed. *See id.* at 581. *Hurley*'s analysis rejects the insinuation that the mere status or identity characteristics of an individual can be the basis of exclusion in defiance of a civil rights law. *See id.* at 572. When it does perform an expressive association analysis, *Hurley* keeps the focus on the expressive association equivalent of the message, rather than the marchers. The *Hurley* statement—that to justify excluding a member, an orga-

nization must show that the member's "manifest views" are at odds with the organization's members' true message—preserves *Roberts*' requirement that a would-be discriminator show actual views as the basis for exclusion, rather than "unsupported [status-based] generalizations," *Roberts*, 468 U.S. at 628, and not be permitted to rely on "*shorthand measures* in place of . . . more legitimate criteria for determining membership." *New York State Club Ass'n*, 487 U.S. at 13 (emphasis supplied).

Third, *Hurley* fully preserves the *Roberts* requirement that in order for an organization to invoke the right of expressive association to defeat a civil rights law, it must show that the targeted individual's "manifest views" conflict with a particular "position *taken* by the club's existing *members*" that is infringed upon. *See Hurley*, 515 U.S. at 581 (emphasis supplied). *See also id.* at 580 (noting necessity of "positions *espoused* by the general club memberships" and "organization's message itself" as predicates for invoking right to defeat statute) (emphasis supplied). Thus in the expressive association context, the *Hurley* Court explicitly and unanimously reaffirmed the requirement of a particular message. It did not wipe out the *Roberts* framework, as BSA's argument would, in favor of allowing a pretextual invocation of the First Amendment to thwart the state's non-discrimination goal without a showing of an actual purpose or message that is burdened.

C. The Lower Courts Have Had No Difficulty Applying This Court's First Amendment Precedents

Lower courts have consistently recognized both the different doctrinal applicability and the underlying compatibility of *Hurley* and *Roberts*. Without confusion or difficulty, they have continued to apply *Roberts* to expressive association cases, *see, e.g., Elks Lodges 19 & 2021 v. Alcohol Beverage Control*, 905 P.2d 1189, 1196-1207 (Utah 1995), while

applying *Hurley* to "pure speech" cases.[16] The courts are easily reconciling the cases. Their expressive associational analysis, like that of the New Jersey Supreme Court, has followed this Court's well-settled framework. This consistent doctrinal clarity among lower courts in their interpretation of relevant First Amendment case law likewise affirms that there is no problem here warranting this Court's intercession.

D. The Supreme Court Of New Jersey Properly Applied This Court's Precedents

The New Jersey Supreme Court performed the rigorous analysis required by the *Roberts* trilogy for BSA's expressive association defense, applied the correct governing principles to BSA's intimate association argument, and furthermore assessed a freedom of speech claim under *Hurley* despite BSA's failure to raise it earlier in the litigation. The court found that the application of the LAD in this case would not burden or alter any actual purpose, message, or activity of the Boy Scouts, or otherwise violate the First Amendment. This analysis is fully consistent with this Court's precedents and with the record in this case, and need not be reviewed here.

1. The Court Properly Found That Enforcement Of The LAD Against BSA's Discriminatory Policy Did Not Violate The Freedom Of Expressive Association

As discussed above, contrary to the BSA's false premise in its Petition and its ongoing effort to relitigate the facts, the

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16 *See, e.g., Sistrunk v. City of Strongsville*, 99 F.3d 194, 198-99 (6th Cir. 1996) (applying *Hurley* to the wearing of a button during a political rally); *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1089-90 (3d Cir. 1995) (discussing *Hurley* in the context of the wearing of a flag patch on a uniform); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 58-59 (N.D. Ohio 1995) (applying *Hurley* in the context of a lecture).

New Jersey appellate courts found that the Boy Scouts' right to expressive association is not infringed because Scouting's members do not come together around an anti-gay or related expressive purpose. 56a. Under the *Roberts* framework, this finding, fully supported by the facts in this case as found by both the Appellate Division and unanimous New Jersey Supreme Court, *see supra*, at 10-17, is sufficient, as a threshold matter, to dispense with the Boy Scouts' expressive association defense. *See Roberts*, 468 U.S. at 626-27 (requiring that actual "views" must exist and be burdened for the right to be invoked); *New York State Club Ass'n*, 487 U.S. at 13 (noting the necessity of "views that the club's members wish to promote" and "specific expressive purposes" that would be seriously burdened by application of a non-discrimination statute).

Furthermore, the court correctly found that even if the application of the LAD had implicated some expressive purpose of Boy Scouts, there was no evidence that James Dale's inclusion in Scouting would require Scouting members to " 'abandon or alter' " their expressive activities or message, *New York State Club Ass'n*, 487 U.S. at 13 (citing *Rotary*, 481 U.S. at 548), or that Dale's membership in Scouting would impose "*serious burdens*," *Roberts*, 468 U.S. at 626 (emphasis supplied), or "affect in [a] *significant way*," *Rotary*, 481 U.S. at 548 (emphasis supplied), the ability of Scouting's members to express those views. *See New York State Club Ass'n*, 48 U.S. at 19 (O'Connor, J., concurring) (a group should be protected if its "expressive purposes would be *substantially undermined* if they were unable to confine their membership.") (emphasis supplied). 51a-52a. BSA failed to meet this test because: (1) BSA does not have an actual expressive position or purpose with which Dale's continued membership would interfere, 52a, and (2) James Dale has no "manifest view" contrary to the purposes that bring Scouting's members together, and has shown no failure to follow the rules on the same terms as his fellow members. 57a; 65a-66a.

Dale was not expelled from Scouting for anything he did or said to convey "any message inconsistent with Boy Scouts' policies." 65a-66a. This is not a case involving "a person who, by word and deed, disagrees with the organization's moral code," Pet. 15; the court below specifically found that he does not. 57a-58a. As the August 10 letter stated, Dale was expelled from BSA because he is gay.[17] 67a. The court below found that he was expelled pursuant to BSA's across-the-board policy of excluding gay members—not for what they say or do, but for who they are—even though non-gay members are permitted to remain, no matter what views or positions they take on "morality" or other matters. 56a.

Likewise, Dale was not expelled because of BSA's need to speak through its "leaders." Significantly, BSA's "leaders" (*i.e.*, all of its one-million-plus adult members), like its youth members, are free to express their moral views pro or con on the inclusion of gay members or gay people's moral fitness—so long as they are not gay. 66a-67a. This is because there is no core expressive purpose of anti-gay ideology in Scouting, and also because, contrary to the Petition and as the courts below found, BSA's policy in truth targets gay *people* (whether youth or adult members or "leaders"), not any *view* pro or con on homosexuality. 56a; 142a-144a. As his record showed, James Dale can lead like any other member, under the same rules and terms as others. BSA's attempt to distract this Court with a specious distinction regarding "leadership" is yet another effort to relitigate the facts, elide the

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[17] Contrary to the Petition, Dale was not expelled because of any "conduct" or misconduct, any "activism" or, indeed, any "views" he had manifested. 65a-67a. BSA's inability to identify any actual inconsistent manifest views is highlighted by the Petition's repeated reference to a single statement made by Dale *after* the commencement of this litigation (and long after the expulsion) deploring BSA's discrimination. Such opposition to discrimination has been expressed by many other (non-gay) members and affiliates with no resulting expulsion from the organization. 56a.

false premise of its argument, and hide its true discrimination.[18]

The court below also correctly found that BSA's suggestion that Dale's identity as a young gay man can serve as a proxy for expression is antithetical to this Court's decisions. *See* 56a-57a ("The United States Supreme Court has not hesitated to uphold the enforcement of a state's anti-discrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members' shared expressive purpose."). Treating a gay person's simple honesty and openness about his or her identity as inherently disqualifying "advocacy" that removes him or her from the protections of an anti-discrimination law—let alone inferring from such identity any particular "viewpoint"—typifies the "overbroad assumptions," "stereotypical notions," and "sexual stereotyping" condemned in *Roberts*, 468 U.S. at 625, 628, and the kind of "shorthand measure" forbidden by this Court in *New York State Club Ass'n*, 487 U.S. at 13. *See also Hurley*, 515 U.S. at 572 (noting that the organizers "disclaim any intent to exclude homosexuals as such" and only sought to prevent them from marching as a contingent under a banner). It cannot be that Jews, Catholics, Puerto Ricans, lesbians, and gay men, or others whose identity may initially go unnoticed, shed all protection—or can have viewpoints or positions ascribed to them and then used with impunity as the basis for discrimination—the moment they identify themselves.

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[18] BSA misrepresents this case as involving a "court's decision to require an organization to put [Dale] into a leadership position." Pet. 15. In fact, like all one-million-plus members over 18, James Dale was made a "leader" by the Boy Scouts; the decision below simply prevents BSA from expelling him from his long-time membership based on prejudice and pretext. Here, too, the Petition's effort to invoke *Hurley* to trump *Roberts* is misguided. Pet. 17, 22. Dale is no outsider seeking to enter the organization or change its message; he is a long-time member fully in accordance with the expression and purposes that bring him and the other members together. 65-66a.

Finally, following the *Roberts* trilogy, the court below correctly found that even if BSA had not failed to establish that boys and adults join Scouting in order to express a shared view regarding the morality of being gay, and had not failed to demonstrate that the admission of "avowed homosexuals" would impede its ability to express such alleged views, application of the LAD to BSA would still have been justified by New Jersey's compelling interest in eradicating discrimination in public accommodations. 64a. Infringements on the freedom to associate "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see also Rotary*, 481 U.S. at 549.

The LAD meets each of these criteria. First, New Jersey adopted the LAD to serve a compelling state interest. *See Hurley*, 515 U.S. at 578 (prohibitions on sexual orientation discrimination serve compelling state interests); 62a ("It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society."). Second, like the statutes at issue in *Roberts* and *Rotary*, the LAD is aimed at invidious discrimination—not viewpoints—and is thus unrelated to the suppression of ideas. *See Roberts*, 468 U.S. at 629; *Rotary*, 481 U.S. at 549. And third, the LAD is narrowly tailored to end discrimination in public accommodations and, as in the trilogy of cases before, there is no alternative for meeting that goal that is less restrictive of associational freedom. *See, e.g., Roberts*, 468 U.S. at 628-29.

2. BSA's Contentions Regarding Intimate Association And Speech Were Properly Rejected

The courts below also properly rejected BSA's intimate association defense. The court found that, like the Jaycees and Rotary, the "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing non-

members to attend meetings, establish that [the Boy Scouts] is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 48a; *see also Roberts*, 468 U.S. at 631 ("Whatever the precise scope of [the right of intimate association, it does] not encompass associational rights of a 295,000-members organization whose activities are not 'private' in any meaningful sense of the term.") (O'Connor, J., concurring).[19]

Second, the court below considered *Hurley* and found that no "pure speech" would be infringed upon by James Dale's continued membership. The court noted that participation in the Boy Scouts is not itself a "pure speech act" or expression as were the parade or parade contingents in *Hurley*. 66a. This finding was correct—"Boy Scouting," *see* Pet. 22, is no more an act of "pure speech" like a parade than "Jayceeing" or "Rotarying" were.

Furthermore, the court found that in this context, BSA's leadership decisions are not "a form of 'pure speech' akin to a parade." 66a. BSA's selection of leaders, *i.e.* its promotion of youth members and welcoming of adult applicants virtually

19 Under the factors deemed relevant by this Court to assess an intimate association defense—"size, purpose, policies, selectivity [and] congeniality," *Roberts*, 468 U.S. at 620—BSA has much in common with the Rotary Club, which was found to have no such right. *See Rotary*, 481 U.S. at 546-47. BSA complains that the New Jersey Supreme Court analogized the facts of this case to those in *Rotary*, Pet. 19, yet in the amicus brief submitted by BSA in the *Rotary* case, BSA compared the two organizations and declared that Rotary and BSA engage in the "same types" of protected activity. Brief of the Boy Scouts of America As Amicus Curiae In Support of Appellants Rotary International, *et al.*, dated December 18, 1986, at 14. Most Boy Scouts troops are approximately the same size as or larger than many Rotary Club chapters, *see Rotary*, 481 U.S. at 546 (noting that the range of sizes of local Rotary Clubs begins at "fewer than 20"), share the basic Rotary Club goals of "humanitarian service, high ethical standards . . . , good will, and peace," *id.* at 548, and are far less selective than Rotary Clubs, which are "not open to the general public." *Id.* at 547.

non-selectively, 78a-79a, is not speech such as participation in a parade, *see Hurley*, 515 U.S. at 569, or wearing an arm band. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969).[20] Scouting's million-plus "leaders" are integral parts of the membership. Thus, the key overall is protection of the organization's (*i.e.*, the members') ability to express themselves—which is not impaired here. While "the Constitution looks beyond written or spoken words" as examples of pure speech, *Hurley*, 515 U.S. at 569, choosing a Scouting leader is no more an act of pure speech than choosing a fellow Scout. Although both acts may implicate expressive association concerns, they do not implicate the speech concerns addressed under the particular facts of *Hurley*. To hold otherwise would render the *Roberts* trilogy toothless and irrelevant.

This Court traditionally does not disturb the decision of a state's highest court when that court has properly and meticulously followed this Court's precedents. Because there is no confusion or conflict below; because this case warrants no special intervention given BSA's atypical government entanglement, special presence in the schools, and self-presentation

20 Quite notably, none of the cases cited in the Petition as evidence that leadership selection fits within the pure speech canon actually says any such thing; indeed, all but one are not even speech cases. *See* Pet. 15-16. Other than *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989), which involves a specialized framework regarding political parties, each of these cases involves employment, not association or speech. *See, e.g., Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996). Furthermore, most of these cases only invoke the First Amendment through application of the Free Exercise Clause. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). These decisions simply do not address the irrelevant leadership selection argument for which BSA cites them.

as "open to all boys;"[21] and because the members of this organization do not have a core expressive purpose that is burdened by the civil rights law, this Court should decline to revisit the unanimous decision of the New Jersey Supreme Court and should deny BSA's petition for a writ of certiorari.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 24, 1999

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[21] BSA is anything but a typical "private" organization whose defense of discriminatory membership policies might be argued to illustrate useful new principles. It is a poor vehicle to raise the rights and responsibilities of the countless genuinely private organizations and associations (expressive and otherwise) that, unlike BSA, are not chartered by the federal government, are not open to virtually anyone, are not entangled with the schools, and do not pursue purposes so wide-ranging, public, and generic that giving them a First Amendment right to discriminate in ways that the government never could would be tantamount to conferring such a right on nearly every imaginable group.